

## Chapter 4: Enhancing Enforcement

The long-term success and financial viability of the Superfund program depend in large part on a robust enforcement program. According to the Office of Enforcement and Compliance Assurance (OECA), every dollar spent on Superfund's civil enforcement program returns approximately eight dollars to the program.

In recent years, the EPA Regions have placed more focus on enforcement, particularly following the inception of the "enforcement first" initiative. As shown in Table 1, this emphasis has paid off. Over the life of the program, responsible parties have funded more than \$18.1 billion in remedial actions at National Priorities List (NPL) sites. Also, the program has secured commitments for an additional \$3.9 billion in cost recovery settlements. Special accounts have generated \$177 million in interest from the \$1.1 billion collected.

**Table 3: Superfund Enforcement Accomplishments\* (Dollars in Millions)**

<b>Measures of Success</b>	<b>FY 1998</b>	<b>FY 1999</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>	<b>Program to Date</b>
Value of PRP response work (work & cash-outs)	\$806.2	\$552.5	\$1,335.5	\$1,329.1	\$501.3	\$904.3	\$18.1 billion
Value of cost recovery settlements	\$229.6	\$232.8	\$145.8	\$413.6	\$126.1	\$225.8	\$3.9 billion
Total value of PRP commitments	\$1,035.8	\$785.3	\$1,481.3	\$1,742.7	\$627.4	\$1,130.1	\$22.0 billion
Funds collected in special accounts		\$87.0	\$80.0	\$311.0	\$132.0	\$111.0	\$1.1 billion
Interest earned					\$23.0	\$21.0	\$177.0 million

\* Data provided by OECA is as of September 30, 2003.

While these results are impressive, improvements in management and performance measurement would increase the effectiveness of the enforcement program. These areas include closer attention to individual regional performance, better measures of cost

recovery success, and early efforts to locate responsible parties. Additionally, several resource issues require immediate attention.

### **Addressing Underutilized Enforcement FTE and Contract Support**

In 1996, at about the time the former Office of Waste Programs Enforcement moved from the Office of Solid Waste and Emergency Response (OSWER) to the newly formed OECA, a crucial enforcement definition was changed. This change redefined the oversight of responsible party remedial actions from an enforcement activity to a response activity. In the Regions, where the oversight work is conducted, this change eventually would cause a significant shift in workload. However, because the impact of this redefinition was not immediately apparent, no full-time equivalent (FTE) positions were transferred to the response program. This is primarily because the level of potentially responsible party (PRP) involvement was lower in 1996 than it is today, meaning that fewer demands were placed on the Region's oversight resources.

Today, with nationwide PRP involvement at 70 percent for remedial actions, the consequences of this change are more obvious. By moving the oversight of PRP remedial actions to response, the program has consistently underutilized enforcement FTE and dollars and overutilized response FTE and dollars. Moreover, the response program has had to use contract dollars from remedial investigation/feasibility studies and remedial designs to cover oversight payroll needs.

While the change in definition has made operations more difficult for response, it has inadvertently helped OECA cover a budget shortfall. Between FY 1999 and FY 2003, OECA's new enforcement contract dollars were cut by over 50 percent. OECA has been able to make up for a majority of this reduction by using the unused payroll dollars made available because oversight was moved to response.

**Recommendation 52:** The Enforcement program should return to a definition that includes oversight of PRP actions as an enforcement activity which will improve FTE utilization. This change will not require any movement of FTEs or dollars. It could, however, free up an annual average of \$5 million nationwide in pipeline dollars that were used to cover the payroll shortages in the response program. Finally, including PRP oversight as an enforcement activity will increase site-specific charging of the regional enforcement FTE.

Implementing this change will require that additional contract funding be provided to OECA to make up for the shortfall now being filled by payroll carryover. These contracts support the Regions in several critical areas—including responsible party searches, ability-to-pay analyses, and waste allocations—and are thus critical to maintaining a high percentage of responsible party work at Superfund sites. With the historically high return on investment from enforcement, maintaining stable funding in this area makes sense. (Near term)

## **Continuing to Increase Responsible Party Involvement**

The current high level of responsible party involvement in NPL remedial actions is a notable success that has taken a great deal of pressure off of appropriated funds. This study found that the Regions with the highest rates of responsible party work at sites share a strong organizational or cultural commitment to enforcement first. In some Regions, a separate and distinct team dedicated to responsible party searches forms the foundation for this commitment. In contrast, this study found that when a PRP search group is structured as an ancillary operation within a cost recovery section, enforcement actions are focused nearly exclusively on supporting litigation to recover money spent by the Agency. As a result, responsible parties are found too late to obtain their involvement in response actions.

This study also found that successful teams include a mix of skills, such as trained civil investigators who can spend time in the field. While some Regions have turned to former compliance officers, remedial project managers, on-scene coordinators (OSCs), and attorneys to conduct search work, the unique background of trained civil investigators brings a key expertise to a successful team. In addition, the Regions with the greatest success in this area rarely use contractors to perform this type of work. While contractors appear to do well on routine tasks, such as title searches or developing databases, they often do not have the investigative skills or commitment necessary to find responsible parties. This use of civil investigators in a PRP search team appears to be a regional best practice. Even in Regions where a strong PRP search group exists, excellent communication and coordination among the remedial, removal, enforcement, and financial management programs and the regional attorneys remains key to program effectiveness.

OECA has taken a first step toward institutionalizing best practices for finding PRPs through its recently published responsible party search manual. While this is an important step, it requires follow-up to ensure that organizational structures are changed to emphasize early and thorough responsible party searches—not just cost recovery—and that PRP search teams have the appropriate skill mix.

## **Increasing PRP Involvement in Removal Actions**

The success of the Superfund program also depends on strong enforcement within the removal program. In fact, since many NPL sites begin as a removal action, then move to remedial action for completion, enforcement needs to be an integral part of both processes. Over the life of the program, the percentage of PRP leads at removal sites has been consistently lower than the level achieved at remedial sites. In part, this reflects the nature of the work, which often requires the Agency to act first and look for PRPs later. Fortunately, as shown in Table 2, the national trend of data shows improvement.

**Table 4: Percentage of PRP-Lead Removal Actions by Region**

REGION	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	5-Year Average
1	12	6	52	46	45	45
2	21	9	4	12	15	12
3	41	52	61	44	44	49
4	49	57	54	66	70	59
5	24	44	51	45	50	44
6	4	39	0	71	68	42
7	39	23	24	26	19	26
8	29	42	24	29	43	32
9	0	20	47	40	50	35
10	25	47	36	20	40	35
Average	30	37	41	46	49	41

As with performance in the remedial area, several Regions have made strides to increase responsible party involvement in removal actions, but the rate is not consistent across the country. Almost 80 percent of the removal actions in the Region with the highest PRP involvement have no enforcement agreement of any kind. Several Regions use this approach, but not nearly to this extent.

More consistent application of enforcement first in the removal program will not only save response dollars, but also free up cost recovery resources, which can be used to conduct PRP searches. Increasing the level of removal enforcement may require the Agency to develop incentives, such as providing a temporary funding bridge, to help Regions shift to a PRP search emphasis without creating a cost recovery backlog. According to several sources, an increasing number of bankruptcies are occurring after removal actions, and the Agency needs to position itself to pursue remaining assets quickly to recoup its expenditures. The study team found that coordinating enforcement work with site assessment work is critical to ensuring that PRP potential is evaluated for removal actions. As with remedial PRP searches, early involvement of civil investigators and other search staff is also key to a successful removal enforcement program.

**Recommendation 53:** To continue to increase the percentage of PRP cleanups and take further pressure off appropriated funds, OECA should conduct responsible party search benchmarking to identify strong regional programs. This benchmarking should be combined with PRP search audits to identify ways to strengthen regional PRP search programs. (Long term)

**Recommendation 54:** OECA and OSWER should work with the Lead Regions to develop goals similar to those in the remedial program for enforcement first in the removal program to increase the percentage of PRP-conducted removal actions. Regions with historically lower PRP percentages should be given some time to develop the proper employee skill mix and procedures before they are held accountable for achieving these new goals. (Near term)

**Recommendation 55:** OSWER should identify a management liaison who can work with OECA to facilitate and support enforcement first for the removal program. (Near term)

### **Exploring Other Sources for Funding Response Activities**

Since the early days of Superfund, some amount of the PRP response actions has been funded by claims against insurance policies. Many of the early complaints about the high transaction costs of Superfund had more to do with legal wrangling between PRPs and insurers who did not want to pay for cleanups, than with costs attributable to the Agency. At this point in the program, a majority of the disputes about the meaning of insurance policy language have been resolved. However, the Agency has been reluctant to explore one area: the search for old insurance policies at what are now considered orphan sites, those sites with no identified responsible parties. A number of interviewees have raised this issue and suggested that the enforcement program needs to take a closer look at this area as a possible source of revenue. Agency expertise in this field, known as insurance archeology, is extremely limited. Several states have done this work at sites and have had some success in finding liable insurers. Outside assistance may be required to carry this out, which means an investment of Agency resources. The benefits, however, could be substantial.

**Recommendation 56:** OECA, in consultation with the Department of Justice (DOJ), should explore ways to access or gain greater expertise in the area of insurance-related cost recovery (i.e., insurance archaeology), and sponsor several pilot programs across the country to increase potential sources of funding for orphan sites. (Long term)

### **Improving Measures for Enforcement Success**

Although the enforcement program has achieved notable results, most of the measures of success employed focus on national targets and cannot identify regional successes or needs for improvement. In fact, PRP involvement is most often represented by one national figure. As shown in Table 5, some regions exceed the national target of 70 percent, while others lag behind it. Because information is not presented at a regional level, the program is unable to share successful approaches in high-performing Regions or address shortfalls in Regions with lower rates of PRP involvement. Since the enforcement program can vary significantly from year to year, this information is portrayed over five years. It should be noted that the percentages for FY 2003 in particular are slightly higher because a number of potential Fund-lead sites were not funded that year.

**Table 5: Percentage of PRP-Lead Remedial Actions by Region**

REGION	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	5-Year Average
1	75	67	50	100	50	71
2	69	55	54	60	92	63
3	79	93	88	100	100	90
4	100	64	86	40	100	75
5	89	80	100	86	100	90
6	67	75	---	50	50	59
7	57	50	50	50	100	61
8	89	67	40	80	86	76
9	75	75	100	100	100	86
10	100	50	50	50	89	72
<b>Average</b>	<b>81</b>	<b>68</b>	<b>67</b>	<b>73</b>	<b>88</b>	<b>75</b>

Similarly, as Table 3 demonstrates, while large amounts of money from past costs have been recovered, the Agency has never compared total recoverable costs to total costs recovered, either regionally or nationally. In part, this comparison is difficult because the Fund was established to clean up orphan sites with few or no viable PRPs. Thus, no matter how robust its enforcement program is, EPA will always have unrecoverable costs. Nevertheless, at sites with viable PRPs, the Agency should compare dollars actually recovered to dollars potentially recoverable. Without such a comparison, the program is relying upon an incomplete measure of success. As responsible parties continually press the Agency to write off past costs, EPA needs some way of ensuring that it is not compromising too much on past cost claims. Such a measure could also begin to reveal what, if any, money is written off because a Region or other entity is conducting activities inconsistent with the National Contingency Plan—costs that are not recoverable.

**Recommendation 57:** To improve individual regional performance, OECA and the lead Region should evaluate current enforcement measures and develop additional regional site-specific measures that provide a more accurate picture of the program’s success and provide an incentive to improve performance. (Near term)

### **Realizing Cost Savings through Collaboration with Responsible Parties**

Overseeing remedial action work at a Superfund site can present a significant cost to the Agency, and ultimately to the PRP who must eventually reimburse EPA for these costs. Many Regions have been able to reduce the cost of oversight by eliminating costly deliverables and using team meetings in place of the exchange of documents to move the cleanup along. By moving to a more collaborative relationship with PRPs, the Agency has achieved better oversight at a lower cost.

There are two key determinants of the cost of oversight: the level of work performed, and whether the work is done by contractors or by EPA staff. Other Agency programs without the resources of Superfund (e.g., the hazardous waste programs) rely much more on Agency in-house staff and the regulated community to provide the appropriate oversight. Several years ago, OECA initiated a reform designed to re-evaluate the Agency's oversight of work conducted by responsible parties. Some Regions have been very receptive to this reform. By placing greater reliance upon the built-in incentive PRPs have to complete work properly (or else pay to redo), in conjunction with appropriate levels of oversight, these Regions have been able to reduce the cost of oversight. However, a number of interviewees, including the Superfund Settlements Group, told the study team that several Regions continue to have high levels of oversight and rely heavily upon contractors to do this work.

Where the Agency has negotiated an enforcement agreement with PRPs, it can recover its costs soon after the money is spent. In cases where no agreement is reached and the Agency issues a unilateral order, the money expended for oversight must be recovered later in the process by filing a cost recovery case. In both cases, however, the Agency must first spend its own money. Thus, any appropriate reduction in oversight costs would be beneficial.

**Recommendation 58:** OECA and the Regions should develop procedures that encourage continued collaboration with PRPs in site cleanups in order to decrease the need for EPA's expenditure of oversight resources. (Near term)

### **Continuing Emphasis on the Cost Recovery Program**

Cost recovery is a critical Agency activity. Without this work, no funds spent by the program for removal or remedial actions would be returned to the Trust Fund to defray the costs of future work. Currently, the cost recovery program is driven by the statute of limitations (SOL). Many of the individual cases come from removal actions at orphan sites. The Agency has three years from the end of the removal to file its cost recovery action. For NPL sites, the Agency has slightly more time—six years from the beginning of remedial action. Even though the program tracks the SOL carefully, dollars have been lost to data or definitional errors, which cause the SOL to be missed.

One of the critical aspects of cost recovery is cost documentation. Although documenting costs is a critical activity, it can conflict with the very nature of time-critical removals. OSCs need to make quick on-the-spot decisions, which can lead to a lack of complete documentation. These incomplete records hinder future cost recovery actions, or increase the time and effort needed to prepare a case. To ensure that OSCs do what they do best—focus on cleaning up a site—some Regions have established field administrative specialists, who support OSCs by tracking and ensuring the proper paperwork exists for every transaction at a removal site. The value of having these specialists was evident in the Capitol Hill anthrax response, where though the Region's costs were closely examined by many auditors, the response costs were well documented.

**Recommendation 59:** Senior management within EPA and the DOJ should affirm their commitment to cost recovery. A joint memorandum to the Regions will re-enforce this message to Agency staff and to the responsible parties. (Near term)

**Recommendation 60:** To improve the tracking and recovery of removal costs, Regions that have not invested in field administrative specialists should develop this expertise, or find other ways to accomplish the same goal. (Long term)

### **Using Special Accounts Effectively**

As important as it is to strengthen and maintain cost recovery programs across the country, it should be an even higher priority to take advantage of opportunities to reduce the need for future cost recovery actions and to focus cost recovery efforts where they are needed the most. Establishing and effectively using special accounts is one such opportunity. The Regions have done an excellent job of negotiating with PRPs to include special account provisions in consent decrees. In fact, a few Regions have established special accounts for nearly every settlement they reached in the last year. However, when it comes to using the money in special accounts, there appears to be fairly significant variability in the Regions' understanding of appropriate uses and the potential benefits. For example, one Region was surprised to learn that special account funds could be used to pay site-related Agency payroll expenses.

Opportunities to improve resource utilization of special account funds are discussed later in this report in the chapter on Optimizing the Use of Superfund Dollars.

**Recommendation 61:** OECA and the Regions should discuss the current special account guidance to determine if additional clarification is necessary to maximize the use of special account dollars. Particular emphasis should be placed on older special accounts to free up money for current work. (Near term)

**Recommendation 62:** Regions should track and periodically report to headquarters how much special account money they are using annually and how they are using it. (Near term)